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In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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In this action challenging the 1980 decennial census figures for Denver, Colorado, petitioners assert that they are entitled to access, through discovery, to confidential lists of residential addresses or vacant dwelling units compiled by the Bureau of the Census.

1. Petitioners, the City and County of Denver and the Mayor of Denver, brought this action in the United States District Court for the District of Colorado to challenge the accuracy of the 1980 census for Denver. Preliminary census figures indicated a total of 491,651 people living in Denver (Pet. 5; Pet. App. A-3),[1] but petitioners contended that the City's population is "over 500,000" (Pet. 4). According to petitioners (Pet. 7), the 500,000 figure is significant because

[1]We have been informed by the Bureau of the Census that the final figure for Denver is 491,396.

it affects both state and federal grants. Petitioners also contend (Pet. 4, 7, 9-10) that the difference between the 491,651 counted in the 1980 census and the claimed total of more than 500,000 would affect the apportionment within Colorado of the State's congressional seats as well as Denver's representation in both Houses of the Colorado General Assembly.[2]

The thrust of petitioners' challenge in the district court was to the Bureau's determination that there were over 16,000 vacant housing units in Denver on April 1, 1980, a figure they alleged was too high. Petitioners sought to obtain "Follow-Up Address Registers" (FARs) and other Bureau documents that identified the units the Bureau had counted as vacant. The information sought by petitioners was derived from the Bureau's questionnaire program and follow-up interviews (Pet. App. A-2, A-8).

The district court acknowledged that evidence submitted by the Bureau of the Census "indicates that definitional differences between the parties as to what constitutes a 'vacancy' may account for the difference in vacancy figures obtained by the Bureau and those obtained by the City" (Pet. App. A-3). The district court nevertheless ordered the Bureau to disclose the FARs to petitioners or, alternatively, to produce a list derived from the FARs that identifies the addresses of living units in Denver that the Bureau had determined to be vacant on April 1, 1980. The court believed this disclosure appropriate in order to determine

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[2]Petitioners do not suggest, however, that an adjustment for the alleged undercount would result in the allocation to Colorado of an *additional* representative in Congress. We have been informed by the Bureau of the Census that, in order to be allocated an additional representative, Colorado would have to gain an additional 508,091 people—a figure far in excess of the number claimed in the instant litigation.

the actual effect of the difference in the definitions of the term "vacancy" utilized by Denver and the Bureau (Pet. App. A-4 to A-5).

2. The court of appeals reversed the discovery order (Pet. App. A-7 to A-11; 644 F. 2d 844),[3] concluding that "both the history of the Census Act and the broad language of the confidentiality provisions of [13 U.S.C. 9] make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality" (Pet. App. A-10). The court of appeals observed that the district court's order "tacitly acknowledged that it constituted an evasion of congressionally mandated confidentiality" by directing that Denver officials maintain confidentiality of the information (*id.* at A-9) and concluded that, in view of the express congressional prohibitions on disclosure, the district court did not have "authority to substitute its own techniques for protecting the confidentiality mandated by the statute" (*id.* at A-10).

The court of appeals also rejected the contention that release of the census data to petitioners was not covered by the prohibitions in 13 U.S.C. 9 because petitioners' challenge to the conduct of the 1980 census was one of the "statistical purposes for which [the information sought] is supplied" to the Bureau (Pet. App. A-10 to A-11, quoting 13 U.S.C. 9(a)(1)). Similarly, the court rejected (Pet. App. A-11) the contention that the prohibition in 13 U.S.C. 9(a)(2) against "publication" of census data barred only dissemination through the media. Accordingly, the court concluded that any remedies petitioners might have to obtain an adjustment of census figures "must lie in some

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[3]The government had appealed the discovery order pursuant to 28 U.S.C. 1292(b).

device other than devices expressly prohibited by a congressional exercise of constitutional authority" (Pet. App. A-11).

3. The decision of the court of appeals preserving the confidentiality of census data is correct and does not, in itself, warrant review by this Court. However, the Court has granted the government's petition for a writ of certiorari in *Baldrige* v. *Shapiro*, No. 80-1436 (Apr. 27, 1981), to review the Third Circuit's decision requiring the Bureau of the Census to release address lists to local officials under the Freedom of Information Act in order to enable them to challenge census figures. In the instant case, petitioners argue (Pet. 12-13), as the Third Circuit held in *Baldrige* v. *Shapiro*, that disclosure to local officials is not barred by 13 U.S.C. 9 because their challenge to the census figures is part of the "statistical purposes" for which the data are supplied.[4] Moreover, here, as in *Baldrige* v. *Shapiro*, the district court sought to circumvent the strict confidentiality requirements of the census laws by ordering the local officials to use the materials solely to challenge census figures and not to disclose the materials to any other person.

Ordinarily, because of the identity of legal issues, we would suggest that the Court hold the petition in this case pending its decision in *Baldrige* v. *Shapiro*. However, in order to ensure that all aspects of census confidentiality are finally resolved, we suggest that the Court grant the petition for a writ of certiorari here. The instant case involves a

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[4]This rationale is explained in the district court's opinion in *Baldrige* v. *Shapiro* (80-1436 Pet. App. 10a-11a). The Third Circuit affirmed "generally for the reasons stated by the district court" (*id.* at 2a). The argument of petitioners herein and the holding of the Third Circuit in *Baldrige* v. *Shapiro* on the "statistical purposes" point are in error for the reasons stated (at 11-12 and 17-18) in the government's certiorari petition in *Baldrige* v. *Shapiro*. We are sending petitioners a copy of the government's petition in that case.

discovery motion to compel production of address lists, not an FOIA request.[5] Review of the Tenth Circuit's decision in this case therefore could foreclose the possibility that, even if the Court reverses the Third Circuit's decision in *Baldrige* v. *Shapiro* requiring disclosure under the Freedom of Information Act, a plaintiff who seeks to obtain access to census materials through discovery in some future case challenging census figures will argue that a discovery request should be viewed differently from an FOIA request. If the Court grants certiorari in this case, we believe that it would be appropriate to consolidate the case with *Baldrige* v. *Shapiro* for purposes of oral argument and to allocate an hour and a half for argument of the two cases.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1981

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[5]The issue of access to address lists through discovery is pending before two other courts of appeals. See *Baldrige* v. *Carey*, No. 81-6042 (2d Cir.); *City of Philadelphia* v. *Baldrige*, No. 80-2785 (3d Cir.).